BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33882

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, et. al.

Appellee

Vs.

Civil Action No. 04-C-710
JEFFREY B. REED, JUDGE
CIRCUIT COURT OF WOOD COUNTY

PARKERSBURG INN, INC.,

Appellant

BRIEF OF APPELLEE WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

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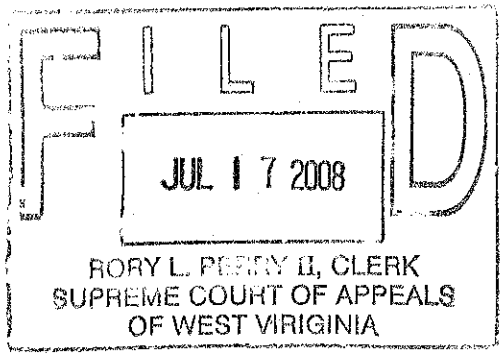

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The West Virginia Department of Transportation, Division of Highways (hereafter "Appellee"), filed a petition on October 29, 2004 in compliance with a Writ of Mandamus issued by the Circuit Court of Wood County to determine the just compensation, if any, due Parkersburg Inn, Inc. (hereafter "Appellant"). The Appellant asserted various theories under which it contended that a taking of the landowner's property interests occurred. The Appellant presented the testimony of appraiser Larry M. McDaniel to support its claim that it was due approximately $8.4 million in just compensation, that representing the total value of the subject property but for the unimproved land.

The Appellee contended that no take of property has occurred in this case. The Appellee's appraisers, Steve Gordon and David Pope, testified that no taking of the landowner's interests had occurred and that just compensation to landowner was zero dollars. The jury below agreed.

The Appellee further contended that any diminution in value of the Holiday Inn property which occurred as a result of decreased income, if any, suffered by the Holiday Inn, was not proximately caused by the construction of the portion of Appalachian Corridor D in the Parkersburg area. The jury below agreed.

II. STATEMENT OF FACTS

The Holiday Inn in Parkersburg operated as one of the only full-service hotels in the Parkersburg area. With approximately 150 rooms and large banquet and ballroom facilities, it and the historic Blennerhassett Hotel were the only full-service hotels in Wood County. The hotel's original 20-year franchise

with Intercontinental Hotel Group (IHG) ended in May 2002. By his own choice, the sole shareholder and owner of the Holiday Inn, James Weigle, opted to renew the franchise license for only three years, although IHG's representative Mike Horgan testified that a ten-year renewal would have been granted if requested by Mr. Weigle. In May 2005, the Appellant did not renew its franchise license, but instead requested the first of numerous extensions of its franchise license. Mike Horgan testified that a renewal of at least 3 years would have been granted in May 2005 if requested. See Trial Transcript, Mike Horgan, pages 40-41, 43-51. In or about August 2006, IHG notified the Appellant of its intent to assign the Holiday Inn franchise license to a new Holiday Inn Express to be constructed at the Mineral Wells exit of I-77, located approximately six (6) miles south of the Appellant Holiday Inn. The closing of the Holiday Inn in July 2007 coincided roughly with the expiration of the Holiday Inn franchise license granted in May 2002.

The construction of Corridor D through Parkersburg, West Virginia necessitated the taking of numerous businesses at the I-77/Route 50 interchange. The Appellee contended at trial, and the jury agreed, that no property of the Appellant was taken incident to construction. The Appellant's driveway connected to 7th Street in Parkersburg, which was previously also Route 50 through Parkersburg. After construction, the Appellant's driveway remained connected to 7th Street at precisely the same location and grade as before construction. In order to access the Holiday Inn from new Route 50 (the new four-lane Corridor D) after construction, a traveler was required to exit

Corridor D and make one additional left turn *only if traveling west*. After construction, a traveler heading east needed only to exit Corridor D onto 7th Street to access the Holiday Inn. Prior to construction, travelers heading east had been required to navigate the heavily-congested two-lane old Route 50 (also known as 7th Street) through all of downtown Parkersburg in order to reach the Holiday Inn; travelers heading west were required to cross heavy oncoming traffic on old Route 50 to enter the Holiday Inn's driveway.

All parties agreed that the date on which the new traffic pattern was initiated was on or about September 8, 2003. This date was treated as the date of valuation (normally referred to as the "date of take") for purposes of determining just compensation, if any.

The financial information produced by the Appellant, as well as occupancy rates collected for hotels and motels county-wide from 2000 through 2006, demonstrated that the Appellant's occupancy rates tracked countywide trends for more than 1-1/2 years following the date of valuation. It was not until mid-2005 that the Appellant began experiencing occupancy rates noticeably below the county average in its hotel class (full-service hotels). The Appellee's expert witnesses testified that a competing property, a Wingate Inn, had opened in the summer of 2005, along with an adjacent conference center. Further, the landmark Blennerhassett Hotel had completed a lengthy renovation in the summer of 2005 and was marketing its new rooms and conference facility in competition with the Appellant.

The Appellant's witnesses claimed that the Appellant's decrease in revenues between September 2003 and January 2007 were caused by the Appellee's construction of Corridor D at the former I-77/Route 50 interchange. However, the Appellee's expert witnesses testified that numerous other factors adversely impacted the Appellant's share of the Wood County lodging market and, therefore, its revenues. These factors included, but were not limited to:

1. The Appellant raised its room rates ("average daily rate", or "ADR") several times between 2003 and 2007 in the face of increasing competition;

2. The Appellant's larger facility of 150 rooms, compared to the 75- to 80-room size of competing properties such as the Wingate Inn, Hampton Inn and Microtel Inn, created a greater burden on the Appellant to achieve a profitable occupancy rate. If the Hampton Inn, located at the nearby Mineral Wells exit, filled 75 rooms a night, it achieved a 100% occupancy rate. If the Appellant filled 75 rooms a night, it achieved a 50% occupancy rate. The Wood County lodging market provided only a finite number of rooms available in any given time period. If the Appellant did not market itself effectively against the smaller, more streamlined Wingate Inn, Hampton Inn and Microtel Inn, or against the historic Blennerhassett Hotel, its market share would decrease;

3. As new hotels were built in Wood County, the number of rooms available to customers increased, thereby decreasing the market share of every hotel unless that hotel managed to hold its market share through competitive pricing or marketing techniques;

4. The Wingate Inn and Grand Pointe conference center opened and the Blennerhassett Hotel completed substantial renovations in the summer of 2005, thus providing the Appellant with much greater competition in its niche, that being the full-service hotel catering to the business traveler and conference/event attendees.

The Appellee's expert appraisers, Stephen Gordon and David Pope, explained that the combination of factors set forth above provided a much more likely explanation for the Appellant's decrease in revenues than the mere change in the traffic pattern to the Holiday Inn in September 2003. Therefore, they found no change in the highest and best use of the Appellant property and no decrease in the fair market value of the property as a result of the Corridor D road construction.

Although the Appellant complained that the new path of travel made it difficult for customers to find the Appellant, the Appellant's own witness, Chamber of Commerce President George Kellenberger, admitted that the Chamber continued to schedule regular events at the Holiday Inn, including the Executive Women's Conference scheduled for February 15 and 16, 2007 (two weeks after Mr. Kellenberger's testimony). See Trial Transcript, George Kellenberger, pg. 18-19) Further, the Appellant's financial information demonstrated that, while occupancy rates and gross revenues dropped between 2003 and 2007, the true losses occurred in the banquet and conference facilities. The revenue enjoyed by the Appellant on its room rentals ("Revenue Per Available Room", or "RevPAR") actually *increased* during this period.

A. DOH INSTRUCTION NO. 2

The instruction as quoted by the Appellant in its Statement of Facts is correct. The Appellee submits that this point was not preserved for appeal or as grounds for a new trial. Upon the Court's insertion of the phrase "as long as access is reasonable and adequate", which language acknowledged and deferred to the Appellant's objection, the Appellant stated no further objection to Appellee's Instruction No. 2, as amended.

B. TESTIMONY OF RODNEY MEERS

The Appellee's experts on appraisal-related matters were Rodney Meers, David Pope and Steve Gordon. Each of these experts, in varying ways, explained that the Appellant's decision to raise rates, or not to "compete on the basis of rates" provided an alternative and, in their opinion, more credible, explanation for any diminution in revenues at the hotel than the Appellant's claim that such diminution resulted from the road construction. No expert attempted to offer opinions concerning the overall quality of the hotel management or claimed to be experts on hotel management.

Rodney Meers, Certified General Appraiser and MAI, was offered as an expert witness concerning the facts gathered by him and the conclusions to be drawn from his analysis of the interstate hotel market throughout West Virginia and particularly in Wood County. Mr. Meers testified that he conducted a personal survey and inspection of all the motels and hotels located at interstate or four-lane interchanges in West Virginia and near the West Virginia borders in surrounding states. He found that, beginning approximately 15 years prior to the

date of valuation, hotels and motels were being built in increasingly difficult-to-reach locations. As real estate prices rose, hotel and motel owners sought to decrease their costs of construction and operation by building smaller, limited-service hotels on smaller lots. The path of travel to the Appellant after construction was no more difficult to navigate than most of the properties Mr. Meers surveyed and was actually easier to navigate than the path of travel to a substantial number of properties constructed in the past ten years. Mr. Meers explained that hotels and motels are considered "destination properties", that being properties which are the specific destination of the customer who has usually made a reservation in advance. Even though a "destination property" such as a hotel may be located on a site somewhat removed from the main thoroughfare, it does not impact the hotel's marketability because reservations are usually made in advance using travel agents, the Internet or telephone.

Mr. Meers was not, as the Appellant suggests, offered for the issue of whether the Appellant's raising of its rates between 2000 and 2007 caused the decrease in occupancy. In fact, Mr. Meers' opinions were fully set forth in the report he prepared of his market study. This market study included an exhaustive review of the physical location and travel pattern to hundred of hotels and motels in West Virginia and surrounding states. He also studied the occupancy data provided by the Wood County Convention and Visitor's Bureau, financial data provided by the Appellant, and trends in the hotel industry statewide. He evaluated all this data through the use of his extensive professional qualifications.

Mr. Meers' testimony established unequivocally that analysis of a hotel property's potential income stream is critical to his field of expertise. Mr. Meers is a Member of the Appraisal Institute (MAI), which is the highest qualification an appraiser can achieve. He is a certified general real estate appraiser in West Virginia, North Carolina and Virginia and has a bachelor's degree in business, with a major in real estate and urban development from the University of Georgia. He has been a commercial real estate appraiser for 25 years and is currently licensed in West Virginia, Virginia and North Carolina. He achieved his MAI designation in 1992. He has performed work with a variety of appraisal companies on large business parks, office buildings, motels and hotels, shopping centers and regional malls. Since 2000, he has performed hundreds of appraisals, including approximately 25 hotels. He has appraised properties for institutional clients, such as banks, lending institutions, corporations and life insurance clients who buy or sell properties in order to achieve acceptable returns on their investments in real estate. (Trial Transcript, Rodney Meers, pp. 83 through 91)

Rodney Meers took the empirical information he collected and considered it in the context of a market analysis to determine whether the new road configuration could be cited as the source of the Appellant's alleged downturn in business. He concluded that there were other forces at work that could just as easily form the basis for any alleged loss in occupancy or revenues during the years following the reconfiguration of 7th Street near the subject property.

C. TESTIMONY OF JIM COCHRANE

Jim Cochrane was never disclosed as an expert witness by the Appellant. The Appellant's counsel offered Jim Cochrane as an expert at trial, but when challenged, coyly claimed that the witness was "confused" about his status as an expert in his deposition. This is one of the more obvious examples of a disturbing trend which existed throughout this case.

The trial court, in denying Appellant's Motion for a New Trial, rejected the Appellant's claim that the witness was "confused". The trial court noted that

> "if there was any confusion on the witness's part or on counsel for the Parkersburg Inn's part, then it was their obligation to clear up that confusion. And during that deposition if it was somehow confusing as to whether Mr. Cochrane was going to offer expert testimony, then I believe that it was the obligation of the party offering that witness to clarify it and make clear on the record as to whether a witness is going to be or not going to be an expert. If any confusion resulted, then the party who created the confusion must bear the harm, if harm results from that confusion." Trans., hearing Sept. 5, 2007, pg. 8.

The Appellant's attorneys treated the entire discovery process as a shell game of "hide the expert witness". The Appellee's attorney was forced to scrutinize the list of 64 witnesses and try to depose them with little or no advance notice of the substance of their testimony. The list of witnesses provided by the Appellant included no reference to their expert or fact witness status, leaving the Appellee to guess, conjecture and surmise about what testimony may be offered at trial.

In its witness disclosures and pretrial memorandum, the Appellant described Jim Cochrane's expected testimony as follows: "*Will testify to damages and access problems. Did appraisal in 2001. Experience with access*

issues and can testify to effects." The appraisal was never disclosed, nor were Mr. Cochrane's professional credentials (his *curriculum vitae)* ever disclosed.

At his deposition, Mr. Cochrane stated that he did not know what he would be testifying to. His deposition, in part, reads as follows:

"Q. Do you know at this point what opinions, whether they be expert or otherwise, that you intend to offer at trial? A. I'm here to answer your questions so I don't know. You know, I will have to wait and see what kind of opinions you-all would like for me to try to give an opinion on, so I can't answer this." Cochrane Depo. Tr. at pp. 6-7. Mr. Cochrane testified under oath that his opinions were *"fact opinion[s], not expert opinion[s]".* Cochrane Depo. Tr. at pp. 27-30.

The Appellant's counsel, April D. Ferrebee, sat through the entire deposition and never corrected the witness's statement that he would not be offering expert opinions.

Not even in the face of the Appellee's Motion in Limine to exclude Jim Cochrane's testimony (filed prior to the September 2006 trial date) did the Appellant's counsel provide written notice that Cochrane would testify as an expert. The first document filed by the Appellant which described Mr. Cochrane as an expert witness was its January 19, 2007 response to the Appellee's Motion in Limine. In its written response to the Appellee's Motion in Limine to exclude Jim Cochrane as a potential expert witness, the Appellant changed tacks and claimed that Cochrane was a lay witness entitled to offer lay opinions. Contrary to the Appellant's assertions, the Appellee's Motion in Limine was filed well in

advance of pretrial hearings and a bench copy provided to the Court. When associate counsel April Ferrebee advised the Court at the final pretrial that she had not received a copy of said Motion in Limine, the Court allowed the Appellant additional time to respond to the Motion in writing, which response was timely filed. However, the Court did not reconsider the Motion in Limine or the Appellant's response until the issue of Mr. Cochrane's testimony arose at trial.

Throughout the pretrial proceedings, the Appellee had to fight to obtain disclosure of a substantial quantity of critical evidence. The Appellee won a motion to compel disclosure of the alleged date of take, itemization of the Appellant's alleged damages, and numerous documents detailing the financial condition of the Appellant. The first trial date of April 11, 2006 had to be continued because of the Appellant's refusal to disclose critical financial information for use by the Appellee's appraisers.

The Appellant disclosed 64 witnesses, of which only CPA George Bailey, engineer Earl R. Scyoc and appraiser Larry M. McDaniel were specifically noted as "expert witnesses". The Appellant further named witnesses including surveyor Paul Kim Marshall, appraiser Randy Reed, appraiser L. Dean Schwartz, Harry Hartleben (later acknowledged to be deceased) and appraiser Thomas A. Motta.

During depositions, the Appellee learned that, with the exception of Larry McDaniel, Earl Scyoc and Randy Reed, virtually every witness listed by the Appellant and deposed by the Appellee had no idea what he or she would be asked to testify to at trial. This was not accidental, but rather appeared to be a purposeful effort to force the Appellee to cover all possible topics during the

limited time available to depose 64 witnesses. Mr. Cochrane's lack of understanding concerning his expected testimony is demonstrative of this overall problem.

The Appellant falsely claims that the Appellee failed to fully disclose its experts' opinions. Footnote 7, page 17 of the Appellant's brief quotes a witness disclosure from July 17, 2006. As of this date, the Appellee's appraisers had been unable to complete their appraisals due to the Appellant's refusal to comply with Orders to fully disclose its financial data to the Appellee. Once this information was received through a subpoena *duces tecum* directed to witness George Bailey, CPA, the Appellee's appraisers completed their reports. These reports were disclosed to the Appellant and the Appellant questioned the appraisers thoroughly about the reports in their subsequent depositions.

D. OTHER APPRAISALS

The Appellant presented the testimony of Randy Reed, an appraiser who appraised the subject property for Wesbanco in October, 2002. The report prepared by Mr. Reed, like many commercial appraisal reports, contained over 100 pages of information and technical analysis which was not discussed or explained during his testimony. The trial court allowed the Appellant's counsel to question Randy Reed as long as counsel liked on the subject of Mr. Reed's appraisal. Likewise, Appellee's counsel cross-examined Mr. Reed extensively. Any and all information the Appellant wished to bring out during direct examination was presented to the jury. During its ruling on the Appellant's Motion for a New Trial, the trial court noted that, through the use of an opaque

projector available during the trial, Appellant's counsel could have literally gone page by page through Mr. Reed's report. Trans., Sept. 5, 2007 hearing, page 12.

However, the trial court expressed concern that the report contained a significant quantity of information that, if not subject to direct and cross-examination, could be highly confusing and/or misleading to the jury. On the record, the trial court discussed the potential violation of Rule 403 and the possibility of witnesses being called to simply authenticate a report then being released without further discussion of the opinions set forth therein. Trans, Sept. 5, 2007 hearing, pg. 12. This discussion echoed the ruling made by the Court shortly after the conclusion of Randy Reed's trial. (See supplemental transcript of trial testimony of Randy Reed, filed with this Court by Appellee on or about July 11, 2008)

In its discussion of the facts, the Appellant implies that Appellee's counsel opened the door to the introduction of the Hartleben and Motta reports by questioning Larry McDaniel about them. This implication is inaccurate. The Appellee's counsel never raised the Hartleben or Motta reports in any way during the trial. The reference, rather is to Larry McDaniel's nonresponsive answer to Appellee's question asking whether Mr. McDaniel had a copy of Randy Reed's report.

The appraisal performed by Harry Hartleben was done in 1994 and Thomas Motta's performed in 1987. Neither gentleman was available as a witness, Mr. Hartleben having passed away in 1995. Mr. Motta was named as a witness by the Appellant, but counsel failed to call Mr. Motta as a witness.

The Appellant claims that the appraisal report of Hartleben and Motta were business records kept by the Appellant in its ordinary course of business. However, the Appellant fails to cite the testimony offered at trial to prove this claim. The reason is that no such testimony exists. The Appellant never offered the Hartleben and Motta reports through any witness who could even discuss the issue of business records. Therefore, this point has not been preserved for appeal by the Holiday Inn.

III. DISCUSSION OF LAW

A. AS GIVEN, DOH'S INSTRUCTION NO. 2 WAS A CORRECT STATEMENT OF THE APPLICABLE LAW, AND THE CHARGE AS A WHOLE SUFFICIENTLY INSTRUCTED THE JURY AS TO THE ISSUES AND THE APPLICABLE LAW

The appellant seeks a new trial based upon its contention that a particular jury instruction was incorrect and misleading. More specifically, the appellant contends that a single paragraph, in a fifteen-page jury charge, at least ten pages of which were devoted to eminent domain and property issues, was an incorrect statement of the law, and that two sentences within that single paragraph were so confusing as to mislead the jury. The appellant's analysis is inherently flawed, as it simply fails to consider the charge as a whole.

> The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of jury instructions **so long as the instructions given as a whole are accurate and fair** to both parties.

Tennant v. Marion Health Care Found., Inc., 194 W.Va. 97, 116, 459 S.E.2d 374, 393 (1995) (emphasis added). "On appeal, the question of whether a jury has been properly instructed is to be determined **not upon consideration of a single paragraph, sentence, phrase, or word, but upon the charge as a whole**." *Id.*, n. 25 (emphasis added).

> **Instructions must be read as a whole**, and if, when so read, it is apparent they could not have misled the jury, the verdict will not be disturbed, through [sic] one of said instructions which is not a binding instruction may have been susceptible of a doubtful construction while standing alone.

Id. (citations omitted) (emphasis added) (correction in original).

> The court's instructions to the jury must be a correct statement of the law and supported by the evidence. **Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy.** The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to the [trial] court's discretion concerning the specific wording of the instruction, and **the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.**

State v. Bradshaw, 193 W.Va. 519, 543, 457 S.E.2d 456, 480 (1995) (emphasis added).

> [The Court] review[s] jury instructions to determine whether, **taken as a whole** and in light of the evidence, they mislead the jury or state the law incorrectly to the prejudice of the objecting party. So long as they do not, we review the formulation of the instructions and the choice of language for an abuse

> of discretion. We will reverse only if the instructions are incorrect as a matter of law or capable of confusing and thereby misleading the jury.

State v. Guthrie, 461 S.E.2d 163, 177-78, 194 W.Va. 657, 671-72 (1995) (emphasis added). Reference to the charge as a whole shows that it could not have misled the jury and that it did not misstate the applicable law to the appellant's prejudice.

The jury was informed that they must consider the instructions as a whole. (Jury Charge at second unnumbered page; Record at 680B). The charge stated plainly that the appellant contended that the Appellee's design and construction of a highway and interchange caused a reduction in the fair market value of the appellant's property, and that the term "damage" means a reduction in fair market value. (Jury Charge at 2; Record at 687B). The term "fair market value" was defined (Jury Charge at 4-5; Record at 689B-690B), and the jury was further instructed that they should consider "every element of value that a buyer would consider before making a purchase[,]" including "the location, surrounding area, . . . and everything that adds or detracts from the value of the property." (Jury Charge at 5; Record at 690B), The jury was further informed that the landowner should be compensated for any decrease in value to the property still owned by the landowner if that decrease was caused by the construction of the road at issue (Jury Charge at 5; Record at 690B), and that the Appellant and Appellee agreed that the property should be valued as the site of a full service hotel (Jury Charge at 6; Record at 691B), The jury was instructed that the income generated by the hotel could be considered if included in a method of

appraisement (Jury Charge at 7; Record at 692B). These instructions, in the context of the evidence and argument already presented by the appellant at trial, made it clear that the appellant believed that the road constructed by the Appellee had rendered access to the property so difficult as to decrease the income of the hotel business, thereby causing a decrease in the value of the appellant's hotel property. In other words, the appellant claimed that the actions of the Appellee had deprived the appellant of reasonable access and thereby reduced the value of its property.

The charge then informed the jury that the Appellee "had an obligation to provide reasonable and adequate access to [a landowner's] business when the locations of streets and highways are changed[,]" and that if "the DOH has not provided reasonable and adequate access" the appellant was entitled to compensation for a reduction in fair market value occurring "as a result of not having a reasonable and adequate access." (Jury Charge at 8; Record at 693B). The jury was further instructed that a change in grade could be considered in determining whether there was reasonable and adequate access (Jury Charge at 8; Record at 693B), and that the appellant could also be compensated on the basis of "going concern value" (Jury Charge at 9; Record at 694B), or condemnation-related "blight" (Jury Charge at 10-11; Record at 695B-696B). Viewed as a whole, it is apparent that the jury could not have been misled as to the applicable law, and the responsibility of the Appellee to provide reasonable and adequate access to the hotel property.

In discussing only two paragraphs of the trial court's charge, the appellant mischaracterizes the substance of those selected instructions and sees, or attempts to sow, seeds of confusion where none exists. Even if those two paragraphs are considered in isolation, they are not misleading but are sufficient to inform the jurors of the applicable law. The two paragraphs quoted by the appellant read as follows:

> The necessity for taking land for a state highway improvement project is a matter within the sound discretion of the West Virginia Division of Highways, and such discretion will not be interfered with unless, in the exercise of such discretion, it has acted capriciously, arbitrarily, fraudulently or in bad faith. In this case the landowner is not challenging the ability or authority of the West Virginia Division of Highways to construct Corridor D where it has been built. . . .
>
> The Respondents' right of access to public roads is not affected within the meaning of the guarantee against public encroachment **so long as a convenient way of ingress and egress remains**. The Constitution does not undertake to guarantee a property owner the public maintenance of the most convenient route to his door. The law will not permit the Respondents to be cut off from public thoroughfares, but they must content themselves with such route for [sic] outlet as the West Virginia Division of Highways may deem most compatible with the public welfare **as long as access is reasonable and adequate**. When the Respondents acquired property in the State of West Virginia, they did so in tacit recognition of these principles.

(Jury Charge at 8-9; Record at 693B-694B (emphasis added)). Read together, even without reference to the whole of the charge, these two paragraphs correctly and reasonably state the law applicable to the facts and circumstances of the case. The first paragraph, contrary to the appellant's cursory

mischaracterization, does not merely instruct the jury "that the DOH has essentially unbridled discretion to take and damage property." (Brief of Appellant at 25). Rather, this paragraph directs the jury to the issues it must consider, narrowing them by pointing out that the Appellee ordinarily has the authority to determine the location of roads, and to take the land it deems necessary for a road project, and that the landowner is not disputing the construction or location of Corridor D.

Having established that the location of Corridor D is not at issue, the second paragraph goes on to clarify what is in dispute and to instruct the jury regarding the legal standards applicable to that dispute. The paragraph at issue simply says that the Appellee has the authority and obligation to design and construct roads with a view to the public welfare, and that, because of this authority, a landowner cannot demand the most convenient means of access. However, the landowner can demand, and the Appellee must provide, access that is reasonable and adequate, access that is convenient[1], even if it is not exactly what the landowner would prefer. Whether or not the landowner is consciously aware of these principles, they still apply.[2]

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[1] "Convenient" has been defined as "1. Suited or favorable to one's comfort, purpose, or needs. 2. Easy to reach; accessible." The American Heritage Dictionary 319 (2nd college ed. 1982). Either of these definitions would appear to be appropriate under the facts and circumstances of the case. If anything, use of the term "convenient" put a greater burden on the DOH and made the landowner's case easier to prove.

[2] Appellant's discussion of the word "tacit" simply makes no sense. A person need not, and cannot be shown, through evidence, to have a tacit understanding of anything. The sentence at issue merely means that an understanding of the pertinent legal principles is inferred from the purchase of land. It refers to a legal presumption which the Appellant failed to rebut at trial.

This instruction is reasonable and sufficient, and incapable of misleading the jury, in light of the charge as a whole. Given that the appellant in this matter had access to a public road, but contended that the access was not reasonable, it is difficult to imagine how the jury might have proceeded to consider the issues without this particular instruction or an instruction that was substantially similar. The Appellee took the position that the access provided to the appellant was reasonable. The paragraph at issue merely makes it clear that a change in access is not automatically compensable, even where a landowner is dissatisfied with the change and claims damage. The new access need not be perfect, it need not be the "most" convenient, it need not be exactly what the landowner would have chosen were a choice available. Had this instruction been removed from the charge, the jury would be left with the unmistakable impression that the Appellee has no discretion in such matters and that what is "reasonable" may be measured solely against the stated preferences of the landowner. Such a suggestion is untenable when weighed against Appellee's obligations to the public at large.

The appellant is simply wrong to contend that the paragraph quoted above contains no objective standard by which the jury is to measure liability. (Brief of Appellant at 32.) To the contrary, the paragraph at issue indicates that the standard is not the landowner's preference, nor is it the uncontrolled discretion of the Appellee, but, given the landowner's right to access and the Appellee's responsibility for public welfare, it is whether the access provided as a result of

the DOH road project is reasonable and adequate, as was set forth repeatedly in the remainder of the charge.

Using an alternative formulation also stated in the paragraph, the standard is whether access is convenient, even if it is not the most convenient way of ingress and egress that might be envisioned by the landowner. The appellant repeatedly presented evidence and argument in support of its contention that the new access was so circuitous and inconvenient that the public would no longer expend the effort needed to find the hotel, thus rendering the access "unreasonable" and reducing the fair market value of the hotel property.[3] Under these circumstances, it makes little sense for the appellant to argue that jurors could be confused by the use of such common and readily understood terms as "most" and "convenient."

The appellant argues that language adopted from *State ex rel. Woods v. State Road Commission*, 148 W.Va. 555, 136 S.E.2d 314 (1964) and *Richmond v. City of Hinton*, 117 W.Va. 223, 185 S.E. 411 (1936) should not be utilized since it is mere *obiter dictum.* The appellant fails to consider that the determination that certain language constitutes *obiter dictum* is case-specific. Further, in cases cited above, the language at issue is not mere *dicta*, but is an integral expression of the Court's discussion of law and its reasoning as it arrives at its decision. Such a discussion typically includes various statements of the legal principles upon which the Court will rely in making its decision. These

[3] In fact, the appellant presented the testimony of appraiser Larry M. McDaniel that that the property was now worth a mere $585,000 (versus Mr. McDaniel's "before" value of $9,000,000), due to the expense of razing the now-valueless hotel prior to resale. Such evidence may have affected the jury's deliberations far more than any purported confusion over the effect of the word "most."

statements routinely cite or quote other cases with approval. In the trial of the instant case, the language which ultimately served as the basis for the challenged instruction was necessary to and consistent with this Court's decisions in *Woods* and *City of Hinton*. The Court, in crafting an appropriate jury instruction from the principles enunciated in *Woods* and *City of Hinton*, utilized language readily understood by a layperson, making it more useful than a rote recitation of unedited syllabus points from the cited cases.

Finally, the law applicable to issues of reasonable access is not solely a matter of case law, but has been incorporated into statute. West Virginia Code § 17-4-47 reads as follows:

> (a) **Access to and from state highways** from and to real property used or to be used for commercial, industrial or mercantile purposes or from and to real property that is subdivided into lots **is a matter of public concern and shall be regulated by the state road commissioner to achieve the following purposes**:
>
> (1) To provide for maximum **safety of persons traveling upon, entering or leaving state highways**;
>
> (2) To provide for **efficient and rapid movement of traffic** upon state highways;
>
> (3) To **permit proper maintenance, repair and drainage** of state highways; and
>
> (4) To **facilitate appropriate public use** of state highways.
>
> (b) Except where the right of access has been limited by or pursuant to law, **every owner or occupant of real property abutting upon any existing state highway has a right of reasonable means of ingress to and egress from such state highway**

> **consistent with those policies expressed in subsection (a)** of this section **and any regulations issued by the commissioner under section forty-eight** of this article.

West Virginia Code § 17-4-48 reads, in pertinent part, as follows:

> The state road commissioner is hereby authorized to issue reasonable regulations specifying standards for the location, design and construction of access facilities to state highways and any other regulations necessary **to carry out the policies stated in section forty-seven** of this article.

Given the responsibility of the Appellee to consider the needs of the public, the law permits a change in access as long as the new access is reasonable. A change in access is not compensable in eminent domain if the new access is reasonable access. Here, the Appellee is in essentially the same position as the trial court, i.e., if this is not the law relating to the issue of reasonable access, the Appellee does not know what law applies.

B. THE COURT DID NOT ERR BY PERMITTING ROD MEERS TO OFFER OPINIONS THAT THE DECREASE IN HOLIDAY INN REVENUE AND CUSTOMERS WAS CAUSED BY FACTORS OTHER THAN THE CONSTRUCTION OF CORRIDOR D

In order to obtain a new trial on the basis of the purportedly improper admission of evidence, the appellant must meet a high standard. The appellant must convince this Court both 1) that the evidence at issue should have been excluded, and 2) that the jury verdict depended on its admission into evidence. Recently, in *San Francisco v. Wendy's Int'l, Inc.*, 221 W.Va. 734, 656 S.E.2d 485 (2007), the Court stated as follows:

> "The Rules of Evidence embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact." *Kannankeril v. Terminix International,*

> *Inc., 128 F.3d 802, 806 (3rd Cir.1997)* To assist the trier of fact, Rule 702 of the *Rules of Evidence* permits opinion testimony by an expert, and states:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> "Rule 702 reflects an attempt to liberalize the rules governing the admissibility of expert testimony." *Weisgram v. Marley Co.,* 169 F.3d 514, 523 (8th Cir.1999). *See also Gentry v. Mangum,* 195 W.Va. at 520, 466 S.E.2d at 179. ("In *Daubert/Wilt*, the *Frye* test was abandoned by the courts, concluding that *Frye's* rigid standard was inconsistent with the *liberal* thrust of the Federal and West Virginia Rules of Evidence."); *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 169, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988) (highlighting the " 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.' "). The rule "is one of admissibility rather than exclusion." *Arcoren v. United States,* 929 F.2d 1235, 1239 (8th Cir.1991)

656 S.E.2d at 492.

> Rule 702 states that a broad range of knowledge, skills, and training qualify an expert as such, and *Gentry* made clear that we have rejected any notion of imposing overly rigorous requirements of expertise. In *Gentry,* the Court expressed the concern that there is no "best expert" rule, and "[n]either a degree nor a title is essential, and a person with knowledge or skill borne of practical experience may qualify as an expert." 195 W.Va. at 525 and n. 18, 466 S.E.2d at 184 and n. 18. Therefore, "[b]ecause of the 'liberal thrust' of the rules pertaining to experts, circuit courts should err on the side of admissibility." *Id.*

656 S.E.2d at 496.

The trial court is vested with the responsibility of applying these principles and determining whether the witness in question meets these criteria. In denying the Appellant's Motion for a New Trial, flatly rejected the Appellant's argument that Rodney Meers was not qualified to offer the opinions admitted at trial. In

response to the Appellant's argument that only a hotel manager could testify to the facts and opinions concerning the Wood County lodging market, the trial court displayed its appreciation for the unique facts of this case, as derived from the tremendous quantity of evidence presented at trial, in stating that:

> "I'm concerned if we brought in a hotel manager, I guess maybe the hotel manager could testify as to the particular and specific fact as to whether raising the rates caused people to not go to the hotel. I **don't know that a hotel manager would know that or be able to get together all the other facts and circumstances that would be necessary to reach that conclusion. To be an expert in this state, under the rules, you have to be able to, as a result of education, training and there's some other factors, be able to assist the trier-of-fact in understanding an issue. This Court believes that Mr. Meers met those qualifications, and any deficit that there may be in his qualifications would go to the weight and credit that the jury could have placed in that testimony.** The Holiday Inn makes some compelling arguments as to why one should not believe or accept the conclusions that Mr. Meers reaches, but that's exactly what they are, arguments . . . "

(Hearing of September 5, 2007, Trial Tr. at 9-10) (emphasis added)

The trial court's ruling as quoted above defers to the oft-quoted rule that "[d]isputes as to the strength of an expert's credentials ... go to weight and not to the admissibility of their testimony." *Gentry v. Mangum,* 195 W.Va. 512, 466 S.E.2d 171 (1995), *citing Daubert vs. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. at 594, 113 S.Ct. 2786 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). *San Francisco v. Wendy's Int'l, Inc.*, 656 S.E.2d at 496.

In *Watson v. Inco Alloys Int'l, Inc.*, 209 W.Va. 234, 545 S.E.2d 294 (2001), this Court held that an engineer could testify regarding the causation and extent

of bodily injuries caused by an industrial accident, based upon his prior experience in analyzing similar such accidents. In arriving at this conclusion, the Court reasoned as follows:

> In *Gentry v. Mangum,* 195 W.Va. 512, 466 S.E.2d 171 (1995), this Court conducted a rather thorough review of the requirements necessary for a witness to qualify as an expert. In Syllabus point 5 of *Gentry* we held:
>
> > In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.
>
> 209 W.Va. 245, 545 S.E.2d at 305.
>
> As we acknowledged in *Gentry,* pursuant to Rule 702, an expert may testify if he or she is " 'qualified as an expert by knowledge, skill, experience, training, or education.' "195 W.Va. at 520, 466 S.E.2d at 179 (quoting W. Va. R. Evid. 702). It has been noted that the use in Rule 702 of the disjunctive "or" allows an expert to be qualified by any of the five methods listed. *See* II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A)(1), at 24 (1994) ("[I]nasmuch as the rule is disjunctive, a person may qualify to render expert testimony in any one of the five ways listed.").
>
> 209 W.Va. at 246, 545 S.E.2d at 306.
>
> With regard to the second part of the above quoted test, we further explained in *Gentry* that
>
> > The second part of the expert qualification criteria is assuring that the expert has expertise in the particular field in which he testifies. Here too, a circuit court has reasonable discretion. In discussing how much of a specialist should the expert be, a circuit court must always remember that the governing principle is whether the proffered testimony can assist the trier of fact. Necessarily the "helpfulness" standard calls for decisions that are very much *ad hoc,* for the question

> is always whether a particular expert can help resolve the particular issue at hand. 195 W.Va. 512, 526, 466 S.E.2d 171, 185.
>
> . . .
>
> In addition, the *Gentry* court observed that "West Virginia Rule of Evidence 702 enunciates the standard by which the qualification of an individual as an expert witness will be determined. It cannot encompass every nuance of a specific factual matter or a particular individual sought to be qualified. It simply requires that the witness must, through knowledge, skill, experience, training, or education, possess scientific, technical, or other specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue. ***It cannot be interpreted to require ... that the experience, education, or training of the individual be in complete congruence with the nature of the issue sought to be proven.***" 195 W.Va. at 525, 466 S.E.2d at 184 (emphasis added) (quoting *Cargill v. Balloon Works, Inc.*, 185 W.Va. 142, 146-47, 405 S.E.2d 642, 646-47 (1991)).

209 W.Va. 245-46, 545 S.E.2d at 305-06.

The appellant is demanding "complete congruence" while mischaracterizing the nature of the proffered testimony. Appellant's claim that Rod Meers' testimony criticizes the Appellant's "hotel management" and "poor management decisions" is a blatant mischaracterization of his testimony under direct examination. Appellant's argument not only fails to consider the nature and extent of Meers' education and training, but exaggerates the import and effect of certain basic introductory testimony.

Mr. Meers has a bachelor's degree in business administration, with an emphasis in real estate and urban development. (Testimony of Rod A. Meers, Trial Tr. at 85). Steadfastly ignoring the true nature of Meers' testimony, the appellant argues, in its Statement of Facts, that Meers had no specific experience or education in hotel management, let alone how to determine the

effect of raising rates." (Brief of Appellant at 4). This assumes that only a hotel manager can understand that raising room rates may encourage a potential customer to look elsewhere. Whether or not an appraiser is "required" to assume good management when undertaking the specific task of appraising a particular property, or not, simply has no relevance, given both the nature and extent of the witness' education and training,[4] and the nature of the specific study that Meers conducted in preparation for trial.

Under direct examination, Meers never testified that bad management caused economic problems for the appellant's business. As background information, he simply addressed basic economic principles applicable to any form of business, defining certain related terms utilized in the lodging industry, e.g., "occupancy rate", "ADR" (average daily rate) and "RevPAR" (revenue per available room), in order to discuss the application of those basic principles to the circumstances at issue. The substance of his testimony was that, looking at local market data, a number of factors other than road design could have influenced the local market and the appellant's business fortunes, and that no single factor (especially the construction of Corridor D) stood out.

The appellant mischaracterizes the full extent of the study conducted by Meers. The study began as a means of determining whether "circuitry of access" or "how hard it is to get to a property" is "something that impacts a hotel property"

[4] Although the appellant contends that the trial record indicates that appraisers "assume" that a hotel is managed reasonably (Brief of Appellant at 39 (citing testimony of appellant's expert Larry McDaniel)), this simply ignores the relevant point: "Analyzing the competitive aspects of the market is one of the most important things an appraiser can do, realizing that as more properties come into a market and when they're coming into a market where the pie is shrinking, they're going to be drawing property – they're stealing business from other properties. That's what it is. They know that they can come in and take business from other properties, and other properties - they leave it up to the other properties to adjust." (Meers Testimony, Trial Tr. at 122).

situated near an interstate or similar road. (Testimony of Rod A. Meers, Trial Tr. at 95). Subsequently, the nature and extent of the analysis changed "to consider whether the Corridor D road project could be determined to have had any specific impact on the subject property." (Testimony of Rod A. Meers, Trial Tr. at 102). This included a closer look at the Wood County lodging market, including the characteristics of the appellant's hotel property, the roadway, the surrounding market, and the competitive aspects of the local market, with the specific question being whether the economic problems suffered by the appellant's hotel could be determined to have resulted from road construction. (Testimony of Rod A. Meers, Trial Tr. at 104).

Mr. Meers actually testified under direct examination that the road construction could not be singled out as the causative factor. Contrary to the appellant's repeated contention that Meers blamed poor management or bad business decisions for the economic problems faced by the appellant's hotel, Meers testified that no abrupt drop in occupancy occurred after the road design near the appellant's property changed. Rather, the gradual drop in the Appellant's occupancy rates showed that a number of factors could have influenced the hotel's business, including, among others, room rates, competition from other properties, the need to renovate the hotel, and the number of potential customers. (Testimony of Rod A. Meers, Trial Tr. at 141-42). After analyzing the statewide interstate-access hotel market to gain an overall market picture, Mr. Meers also examined other Wood County hotel properties and their respective locations when compared to the appellant's property (Testimony of Rod A. Meers, Trial Tr. at 144-67), ultimately concluding that, after the new road design

was constructed, the access to the appellant's property was typical and reasonable in the hotel industry.

Meers' research into the statewide hotel market, including access routes and the size and design of recently-built hotels and motels, led him to conclude that the appellant's property was relatively old and had certain characteristics that made it more difficult to operate profitably in the current market, particularly when compared to newer hotel designs. (Testimony of Rod A. Meers, Trial Tr. at 168-69). This analysis was well within Meers' education, training, experience, and the specific research and preparation that he had undertaken prior to trial.

Appellant's apparent contention that a qualified and experienced commercial real estate appraiser is *per se* incompetent to analyze a hotel management decision is itself a red herring. First, it relies upon the presumption and mischaracterization that the question at issue was so peculiar to hotel management that only a hotel manager might understand it. This argument defies everyday experience and common sense. As gasoline prices gradually exceed $4.00 per gallon, the notion that raising the price of a product or service may discourage customers, and thereby reduce overall profit, is readily recognized as a basic economic principle well within the understanding of a person with experience or training in business matters. The concept of selling one's product at a price which balances the need to attract buyers yet still make a profit is undoubtedly addressed on a business major's first day at college. The concept of renting hotel rooms at a price which balances the need to attract customers against the need to make a profit is certainly within the expertise of Mr. Meers, whose career depends on accurately predicting for a client which hotel or commercial property may be purchased with the expectation of turning a

profit on the investment. To suggest that the topics addressed in Mr. Meers' testimony can only be addressed by someone bearing the magic title of "hotel manager" completely ignores the ruling in *Gentry v. Mangum* quoted extensively above.

The objections raised by the Appellant apply to the weight, not the admissibility of Mr. Meers' opinions. The Appellant cross-examined Mr. Meers at length regarding his professional background and the basis for his opinions. The jury was clearly apprised that Mr. Meers was not testifying as an expert in the management of a hotel property and judged his opinions accordingly.

The Appellee was entitled to present to the jury the entire financial picture applicable to this property. Anything less would have unfairly prejudiced the Appellee in defending the Appellant's claims that the Appellant's alleged financial downturn was proximately caused by the Appellee's road construction. The Appellant would like to pretend that its own business decisions, such as failing to renew its franchise and raising its rates in the face of increased competition, were not subject to scrutiny by the jury to rebut the opinions of Larry McDaniel and other Appellant's experts. The strong professional background and broad-ranging experience of Rodney Meers rendered him uniquely qualified to explain to the jury the possible effects of Appellant's management decisions on the revenues of the hotel. Rodney Meers never classified the decisions as "good" or "bad"; he simply made certain that the jury had the entire picture of all the facts which could explain the Appellant's alleged financial downturn.

Not only does the Appellant utterly fail in its argument that the evidence at issue should have been excluded, the Appellant likewise fails to demonstrate that

the jury verdict depended on the admission into evidence of the subject testimony. The Appellant's argument takes Mr. Meers' testimony regarding the Appellant raising its rates out of overall picture and elevates it to "larger than life" status. This testimony is one part of a larger picture. The Appellant selectively and improperly carves out this testimony and holds it up on a pedestal as if it was Mr. Meers' only testimony. Mr. Meers' testimony about rates was not opinion, but rather factual information offered in support of his overall opinion that the road access was not clearly the cause of any problems suffered by the Appellant. Rodney Meers was never asked for opinions regarding hotel management during his direct examination.

The Circuit Court recognized this selective analysis of Mr. Meers' testimony for what it was when ruling on the Appellant's Motion for a New Trial. The lower Court rejected this argument, noting that:

> **"There was a lot of information and statistics presented in this case. If was not all, 'Well, gee, you know, the Holiday Inn raised their rates. That's the only explanation.' There was evidence of other hotels going into the market, hotels going out of the market, room occupancy information.** And so this Court cannot say that Mr. Meers' conclusions or the conclusion argued by the petitioner that raising the rates had some affect upon the occupancy, I can't say that that's not supported by the evidence. Not just Mr. Meers' testimony, but the other evidence that was presented in this case."

(Tr., hearing of September 5, 2007, pp. 9-10) (emphasis added)

The other obvious reason that the Appellant cannot demonstrate that the jury verdict depended on the admission into evidence of the challenged testimony is that numerous other witnesses besides Rodney Meers testified that

the Appellant raised its rates after the new road opened, from the fall of 2003 through the trial date of January 2007. Before Mr. Meers testified, the Appellant introduced testimony through the deposition of its deceased expert CPA George Bailey that the Appellant had raised its room rates during the period at issue and that, in the expert's opinion, the rate increase had no effect on customers' decision to stay at the Appellant hotel. (Testimony of George Bailey, Jr., Trial Tr. at 114, lines 16-24.) During the cross-examination of the Appellant's CPA David Tenney, Mr. Tenney testified to the exact rate increases effected by the Appellant beginning in 2003 and acknowledged that there were pros and cons, good things and bad things about raising product prices. (Testimony of David Tenney, Trial Tr. at 184) No objection was raised to this testimony by the Appellant. At page 190 of David Tenneys trial testimony, he acknowledges that raising prices did not guarantee that a customer would pay the increased price. At page 193, Mr. Tenney admits that a decrease in telephone reservations experienced by the Appellant (demonstrated on a graph) could be attributed to the gradual 22% increase in the Appellant's rates. Again, no objection was raised by the Appellant to this testimony.

Appellee's appraiser and MAI Stephen Gordon testified on direct examination that, during the period analyzed, the Appellant hotel was raising its rates while occupancy was dropping and competition intensified with the opening of the Grand Pointe Conference Center and the reopening of the Blennerhassett Hotel. (Testimony of Stephen Gordon, Trial Tr., at 333, line 14 through 334, line 8). No objection was raised by the Appellant. The quotes in the Appellant's Brief

from Mr. Meers' deposition and report are irrelevant to the Appellant's argument. The deposition would have been useful if the Appellant had objected to Mr. Meers' qualifications prior to trial, but it did not.

The Appellant's argument concerning Mr. Meers' reliance on hotel/motel tax revenue is unsupported by the transcript. In fact, a review of the quoted testimony (Brief of Appellant at 8, quoting page 190 of Mr. Meers' trial transcript) does not, under the most liberal of circumstances, support the claim that the witness referred to excluded evidence. The testimony quoted by the Appellant refers generally to "paintbrushes used to paint the picture of a motel" never refers to the Wood County hotel/motel tax. Not in its wildest imagination could the jury have concluded from this testimony that the witness was referring to the excluded hotel/motel tax information! Even the trial court, in its ruling on the Appellant's Motion for New Trial, was "not convinced" that the ruling *in Limine* was violated. If it was, it was "a very small part of their evidence and certainly did not - - in this Court's opinion, did not raise or rise to the level to create a problem". (Hearing of Sept. 5, 2007, Tr. at 8-9.)

Mr. Meers never testified to any information or conclusions drawn from the hotel/motel tax. Mr. Meers offered only testimony concerning ADR of the Appellant to demonstrate that its ADR had actually increased during a period which the Appellant claimed a decrease in room revenues. Mr. Meers' other testimony regarding the performance of the subject versus other hotels focused on the Appellant's occupancy rates and their decline relative to the Wood County-area market overall. It is important to note that both the Appellant's

revenues and occupancy rates countywide were independently admitted as evidence with no objection. Any reference by Mr. Meers to the Appellant's ADR was based upon the Appellant's own financial data supplied in discovery.

The Appellant is further barred from objecting to this testimony due to its failure to raise an adequate objection during trial. The only objection raised by the Appellant to testimony relating to the Appellant's room rates was as follows:

"Q. Okay. At the end of the year, is that when a manager can look back and say, Okay. Over the course of this past year, we were able to collect X number of dollars for X number of rooms, and then calculate the average daily rate?

MR. MASTERS: Your Honor, I have an objection to - he hasn't been qualified as a hotel manager, and is talking about management decisions at hotels.

THE COURT: The objection's overruled. Let's keep it brief."

(Testimony of Rod A. Meers, Trial Tr. at 114, line 23 through 115, line 5)

Interestingly enough, however, the Appellant failed to object to the following testimony, during which Rodney Meers testified to the very opinions the Appellant now claims should have been excluded:

"Q. Is there a balance to be struck between trying to maximize your occupancy rate and trying to maximize the amount of money that you're making?

A. There is.

Q. How so?

A. Well, **if you increase your rates too much, you'll chase away business** and your occupancy will go down and your revenue per available room will go down also. Similarly, you can decrease your rates too much and you might run at full occupancy 100%, but you're still not making as much per available room because you're giving away too much. The trick is to find that ground in the middle where your property can position itself and claim that share of the pie as theirs."

(Testimony of Rod A. Meers, Trial Tr. at 115, lines 9-22.) (emphasis added)

During cross-examination, Mr. Meers testified without objection that:

"[occupancy rates are] just one of the paintbrushes that could be used to paint the picture of a motel. There are other things, **including the rates that they choose to charge for the rooms with the intent of maximizing whatever profit they can**, positioning themselves properly in the market, maintaining the property as necessary to continue stabilized operations, and just generally keeping track of what's happening and reacting accordingly."

(Testimony of Rod A. Meers, Trial Tr. at 190, line 5-13) (emphasis added)

Even if the Appellant could sustain its argument that Mr. Meers was somehow unqualified to offer the opinion contained in this testimony to which the Appellant expressly objected, the remaining substance of Mr. Meers' testimony, including but not limited to the quotes set forth above, renders the error, if any, harmless.

> When improper or incompetent evidence for the plaintiff is erroneously permitted to go to a jury, but it affirmatively appears, from the competent evidence in the case that the verdict of the jury in favor of the plaintiff was fully warranted, the error aforesaid will be treated as harmless and nonprejudicial, and the verdict so returned, and the judgment based thereon, will not be disturbed by this Court. The same principle applies to a case where improper testimony favors a defendant, and the verdict is in his favor.

Reager v. Anderson, 179 W.Va. 691, 701, 371 S.E.2d 619, 629 (1988).

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding **must** disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

179 W.Va. at 628, 701, 371 S.E.2d at 700, n. 5 (emphasis added) (quoting W. Va. R. Civ. P. 61).

Only now, in the wake of an adverse verdict, does the Appellant point to these various portions of Rodney Meers' testimony as grounds for a new trial. The Appellant did not preserve an objection to Mr. Meers' testimony as a whole. Any attempt in this Petition to appeal Mr. Meers' entire line of testimony ignores the Appellant's hit-or-miss objections to specific items in Meers' testimony.

C. THE EXPERT TESTIMONY OF JIM COCHRANE WAS PROPERLY EXCLUDED AND ITS EXCLUSION DID NOT AFFECT THE OUTCOME OF THE TRIAL

Just as Rule 702 favors the admission of expert testimony, the discovery rules favor the disclosure of evidence prior to trial. In its brief, the Appellant effectively admits that it did not disclose Jim Cochrane as an expert witness prior to trial. At trial, the Appellee did not "disingenuously" claim "surprise" when Jim Cochrane was asked introductory questions typical of those used to establish an expert's credentials, but did argue that the Appellant had failed to clearly disclose the witness as an expert and that the Appellee was unable to adequately prepare for Cochrane's deposition, was therefore unable to question him appropriately at the deposition or at trial, and was thus prejudiced. Regardless of the Appellant's intent, the failure to clearly designate Cochrane as an expert, along with the fact that Cochrane, prepared no written report[5], the fact that the Appellant provided no useful summary of Cochrane's expected testimony, and the fact that Cochrane was listed as one witness among dozens, is a pattern of omission that suggests a willful attempt to obscure his role as an expert witness, as well as a failure to cooperate reasonably in regard to discovery.

[5] In contrast, DOH witnesses Rod Meers, David Pope, and Stephen Gordon were explicitly disclosed as expert witnesses in disclosure documents, and each prepared a voluminous written report that was provided to the appellant prior to their depositions.

"Unquestionably, the trial court possesses the inherent authority to impose sanctions for failure of a party to supplement discovery as required by Rule 26(e) of the rules of Civil Procedure. One such sanction authorized by this Court is the exclusion of evidence." *McDougal v. McCammon*, 193 W.Va. 229, 238, 455 S.E.2d 788, 797 (1995).

> "Rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. As the drafters of the rules appear to recognize, evidentiary and procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case. Thus, absent a few exceptions, this Court will review all aspects of the circuit court's determinations under an abuse of discretion standard."

193 W.Va. at 235, 455 S.E.2d at 794 (citations omitted) "Thus, evidentiary decisions of a trial court are entitled to substantial deference." *Id.*, n.5.

Contrary to the Appellant's contentions, the Appellee did argue that the objectionable actions of the Appellant during discovery appeared to be willful. (Testimony of Jim Cochrane, Trial. Tr. at 13-14, 19-20). Consideration of the four factors set forth in *Prager v. Meckling*, 172 W.Va. 785, 310 S.E.2d 852 (1983) shows that exclusion of Cochrane's expert testimony was appropriate and within the trial court's discretion.

> Factors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e)(2) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery

requests; and (4) the practical importance of the evidence excluded.

172 W.Va. at 787, 310 S.E.2d at 853, Syl. Pt. 5. As to the first factor, the Appellee was prejudiced in that it was unable to prepare adequately for cross-examination since no expert information was provided prior to deposition and the witness specifically stated in his deposition that he had performed no research, no analysis, and had not prepared to give any type of expert opinion. This statement was never corrected or clarified prior to trial. Having been unable to prepare adequately prior to deposition, counsel for the Appellee attempted to elicit the nature of the witness's testimony at deposition, and to that extent had attempted to cure the prejudice. However, the trial court clearly believed that this second factor should not weigh heavily in favor of admitting the testimony, since the Appellant could have provided notice or otherwise clarified the issue so easily prior to trial. (Testimony of Jim Cochrane, Trial. Tr. at 21, 22).

In regard to the third *Prager* factor, Appellee's counsel argued at trial that, regardless of its intentions, the Appellant had ample opportunity to correct the witness's misleading testimony at his deposition, or to clarify the status of the witness through correspondence or formal pleading, and failed to do so. This repeated failure to correct the situation is indicative of willfulness, and, even if inadvertent, has the same effect.

The fourth factor is the practical importance of the evidence excluded. Although the Appellant contends that the excluded testimony was needed to rebut the testimony of Appellee's expert witness Rodney Meers, comparison of Cochrane's deposition testimony with the testimony actually presented at trial

shows that Cochrane's testimony would have been repetitive and would have duplicated other witnesses' testimony.

Cochrane testified at his deposition that he had prepared no independent research, nor had he undertaken any type of preparation or analysis in order to present an expert opinion. ("Respondents' Memorandum in Support of Motion to Set Aside Verdict and Award a New Trial" at 10). Thus, to the extent that his testimony might have served as a rebuttal of Rodney Meers' report, Cochrane's testimony would have relied upon observations drawn from the Meers report itself, and not from any independent work performed by Cochrane. As such, the points relating to Meers' report raised by Cochrane in his deposition (Respondent's Memorandum in Support at 10-11) could have been, and were, raised by appellants' counsel during the cross-examination of Rodney Meers. (Testimony of Rodney Meers, Trial. Tr. at 190-92).

To the extent that the appellant contends that Cochrane's opinions were those of a layperson,[6] despite the fact that Cochrane's experience as a real estate developer was consistent with his characterization as an unpaid expert, similar testimony was presented by other witnesses, both lay and expert. The substance of Cochrane's excluded testimony was that, based upon Cochrane's experience as a hotel manager, the appellant's hotel was not a viable business entity since it could not survive financially at an occupancy rate of 51%, and that,

[6] It must be noted that an overly liberal interpretation of Evidence Rule 701 not only renders the concept "lay witness," and thus Rule 701 itself, meaningless, but effectively encourages discovery abuse in relation to the disclosure of expert witnesses and the pre-trial discovery of their expected testimony. The simple fact that Cochrane was apparently provided a copy of Meers' report for review and comment plays havoc with the notion of "lay witness."

based upon his experience as a real estate developer, access to the property was now so poor that it was no longer a usable commercial property for any business requiring easy access by the public. (Respondents' Memorandum in Support at 12-15).

The testimony of two CPA's who worked with the Appellant, David Brian Tenney and George Donald Bailey, Jr., was presented to the jury. Mr. Tenney testified that the appellant's hotel was not a viable business (Testimony of David Brian Tenney, Trial Tr. at 128, 140), and that the business's revenue had fallen after the change in access to the hotel occurred. (Testimony of David Brian Tenney, Trial Tr. at 132). He also testified that the hotel had an occupancy rate of over 70% in 2000, but that this rate had fallen to 51% in 2005. (Testimony of David Brian Tenney, Trial Tr. at 136-37).

Mr. Bailey's testimony was read into the record from his evidentiary deposition. He testified that the appellant's business was not viable (Testimony of George Donald Bailey, Jr., Trial Tr. at 100-02), and that the loss of viability was attributable to the change in access. (Bailey Testimony, Trial Tr. at 109-10). He offered his opinion, as a lay witness who was familiar with the hotel's location and the roads leading to it, that, after the change in access, it was extremely difficult for people to understand where the hotel was located and to reach it. (Bailey Testimony, Trial Tr. at 109-10). He testified that he attributed the fall in occupancy rate to the change in access, since he knew how the hotel had been and was being operated, and that the only change was the change in access. (Bailey Testimony, Trial Tr. at 111). He also testified that the room rate was

competitive and that he believed that any change in the rate had no effect. (Bailey Testimony, Trial Tr. at 114-15). Finally, he testified that the business was essentially worthless and that he did not know any way of making it a profitable venture. (Bailey Testimony, Trial Tr. at 121).

George Kellenberger testified that it was an "atrocious challenge" to attempt to give directions to the hotel after the change in access, and identified four organizations that no longer held meetings at the appellant's hotel due to the difficult access. (Testimony of George Kellenberger, Trial Tr. at 12, 15). David Grayson Ashley, general manager of appellant's hotel, testified that the occupancy rate in 2000 was 70.5%. (Testimony of David Grayson Ashley, Trial Tr. at 58). He further testified that direct access to Route 50 had been "cut off" and that the hotel began receiving complaints from people who claimed to have trouble reaching the property.[7] (Ashley Testimony, Trial Tr. at 65-66).

Two appraisers were called upon to testify on behalf of the appellant, Larry M. McDaniel and Randy Reed. Mr. McDaniel testified that it was apparent that the appellant's property was not viable as a hotel once access had been changed so that it was located on a "dead-end roadway." (Testimony of Larry M. McDaniel, Trial Tr. at 83). He then testified that the appellant's property would not be the type of site chosen for development as a hotel or motel due primarily to the "unreasonable traffic access." (McDaniel Testimony, Trial Tr. at 84). He testified that the hotel's physical structure was not only worthless, but a liability, in that it would have to be demolished in order to make the land an attractive site

[7] Subject to a cautionary instruction, various witnesses testified that they had received complaints relating to access problems after the change in access to the hotel property.

for commercial development of a type where access is not a concern. (McDaniel Testimony, Trial Tr. at 85, 87-88). Mr. Reed testified that he projected that the appellant's property, as a full-service hotel, would require a 60-65% occupancy rate in order to remain viable as a business. (Testimony of Randy Reed, Trial Tr. at 41-42). Finally, Mr. Cochrane was permitted to testify as a lay witness, and stated that the new interchange was very confusing, and that he had been forced to send visiting clients to other hotels in the area with more direct access due to the apparent inability of visitors to find the appellant's hotel. (Cochrane Testimony, Trial Tr. at 26-28).

"A judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." *McDougal v. McCammon*, 193 W.Va. 229, 239, 455 S.E.2d 788, 798 (1995) (citations omitted). When the testimony of the various witnesses presented on behalf of the appellant is reviewed, it is apparent that Cochrane's deposition testimony would have added nothing to the evidence presented, in some cases repeatedly, by other witnesses, both lay and expert. The exclusion of Cochrane's testimony kept nothing from the jury and could not have had an effect on the verdict in this matter. Since the trial court's exclusion of his testimony had no effect on the outcome of the trial, if the trial court erred in excluding Cochrane's testimony as a discovery sanction, that error was harmless. A new trial is not warranted.

D. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO ADMIT THE APPRAISAL OF RANDY REED INTO EVIDENCE AND IN EXCLUDING EVIDENCE OF THE VALUE OF THE APPELLANT'S PROPERTY EXTRACTED FROM APPRAISALS PERFORMED IN 1987 AND 1994, RESPECTIVELY.

The Appellant contends that the appraisal report of Randy Reed should have been admitted into evidence, along with evidence of the value of the appellant's property in 1987 and 1994, i.e., the fair market value of the property as determined by appraiser Thomas A. Motta in 1987 and by appraiser Harry C. Hartleben in 1994, respectively.

> "Rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. As the drafters of the rules appear to recognize, evidentiary and procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case. Thus, absent a few exceptions, this Court will review all aspects of the circuit court's determinations under an abuse of discretion standard."

McDougal v. McCammon, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (citations omitted) "Thus, evidentiary decisions of a trial court are entitled to substantial deference." *Id.*, n.5. "More importantly, this Court has consistently held that where the plaintiff does not prevail as to liability, errors affecting damages are harmless "because, . . . [the plaintiff] is not entitled to any damages." 193 W.Va. at 239, 455 S.E.2d at 798 (modifications in original) (quoting *Prager v. Meckling*, 172 W. Va. 785, 791, 310 S.E.2d 852, 857 (1983).

The evidence at issue is, arguably and at best, relevant only to the value of the Appellant's property and the determination of just compensation. Thus,

any error as to the exclusion of this evidence is harmless as the jury determined that the change in access did not affect the value of the Appellant's property. The Appellant did not prevail as to liability and was not entitled to any damages. A new trial should not be granted since the verdict of the jury could not have been affected by the exclusion of the Reed appraisal report or the value determinations found in prior appraisals.

To the extent that the Appellant contends that the appraisal reports are business records and thus exceptions to the hearsay rule, the Appellant begs the question. Evidence Rule 803(6) refers to a record kept in the course of a regularly conducted business activity and that was made as a regular practice of that business activity. Aside from the claim that these appraisals were not prepared as a result of litigation, there is no evidence that they have the characteristics required of a business record as defined by the rule. Further, it is difficult to imagine how appraisals prepared by independent contractors at intervals of several years can be deemed to be records of a regularly conducted business activity when the business at issue is the operation of a hotel.

The trial court's reasoning for refusing the admission of the Reed appraisal report was made clear in the course of trial. Initially, when its admission into evidence was denied, Mr. Reed was present and available to testify. The trial court stated that it was best to have the appraiser testify and be cross-examined so that the jury could evaluate the information contained in the report, and that submission of the report to the jury would then be duplicative. (Testimony of Randy Reed, Trial Tr. at 40). Subsequently, the trial court explained its ruling in

more detail, indicating its concern that the submission of an appraisal report to the jury without adequate testimony explaining its meaning would result in confusion, speculation, and tend to mislead the jury rather than assist it. (Court's Ruling on Randy Reed's Report, Tr. at 3). These same concerns would apply to the 1987 and 1994 appraisal reports. This is, in substance, the trial court's reasoned application of Evidence Rule 403 and, as such, it falls within the trial court's broad discretion.

The Appellee did not raise the issue of other appraisals, but specifically cross-examined the appellant's appraiser Larry McDaniel regarding the Reed appraisal report as a means of inquiring into Mr. McDaniel's appraisal methods and his use of that report. Mr. McDaniel mentioned other appraisals in a nonresponsive answer to a question concerning only the Reed report. Thus, the Appellee did not "open the issue." (See Trial Transcript, Cross-examination of Larry M. McDaniel, pg. 21) Further, the jury could hardly have believed that the Appellant was attempting to hide something from them (Brief of Appellant at 20), as counsel for the Appellant attempted to elicit the 1987 and 1994 appraisal values and counsel for the Appellee objected in the presence of the jury. The same can be argued for the exclusion of the Reed report. The more likely result is that, if the jury suspected either party was trying to hide something, the Appellee would have suffered the consequences.

Finally, the issue of just compensation is to be determined as of the date of take (September 8, 2003), and the Appellant presented evidence of value as determined by two independent appraisers. Under these circumstances, nether

the relevance, nor the importance, of fair market values as determined through two appraisals performed, respectively, nine and thirteen years prior to the date of take, is readily apparent.

IV. RELIEF PRAYED FOR

The Appellee, therefore, prays that this Honorable Court affirm the decision of the Circuit Court of Wood County in denying the Appellant's Motion for a New Trial and Order that the verdict of the jury be confirmed.

Respectfully submitted,
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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33882

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, et. al.

Appellee

Vs.

Civil Action No. 04-C-710
JEFFREY B. REED, JUDGE
CIRCUIT COURT OF WOOD COUNTY

PARKERSBURG INN, INC.,

Appellant

CERTIFICATE OF SERVICE

The undersigned counsel for the Appellee hereby certifies that she did serve the foregoing and attached Brief of Appellee, West Virginia Department of Transportation, Division of Highways upon the following parties by mailing a true copy of the same, postage prepaid, U.S. Mail, on this the 17th day of July, 2008:

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